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No. 83-1107

IN THE

Supreme Court of the United States

October Term, 1983

CITY OF DEARBORN, a Michigan Municipal Corporation, et. al., *Petitioner*,

v.

KATHERINE AMEN, et. al., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THERE HAS BEEN AN UNCONSTITUTIONAL TAKING OF PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION WHERE THE PRACTICES OF A CITY IN THE CONDUCT OF AN URBAN RENEWAL PROGRAM HAVE THE COMBINED EFFECT OF FORCING OWNERS TO SELL TO THE CITY AND TO ACCEPT LESS THAN FAIR COMPENSATION.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Katherine Amen, et al., respectfully prays that Petitioner's Request for the issuance of a writ of certiorari to review the Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 6, 1983, be denied.

OPINION BELOW

The Opinion of the Court of Appeals is reported in *Amen* v. *City of Dearborn*, 718 F2d 789 (6th Cir. 1983) and appears in the Appendix to Petitioner's Petition for Writ of Certiorari. Previous Court of Appeals and District Court for the Eastern District of Michigan Opinions in the same matter are reported at 532 F2d 554 (6th Cir. 1976) and 363 F. Supp. 1267 (E.D. Mich. 1973), respectively and are contained in the Petitioner's Appendix. Various other Opinions and Orders of the Court of Appeals and District Court are unreported and are found in said Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was decided and entered on October 6, 1983. The Petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V

No person, shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner correctly noted in its statement of the case that this class action suit seeks injunctive relief and damages for the taking of property without adequate compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. Jurisdiction was initially founded on the general federal question jurisdictional statute, 28 U.S.C. Sec. 1331 and the civil rights jurisdictional statute, 28 U.S.C. Sec. 1343(3).[1]

Petitioner, however, fails to adequately describe the clearance activities that are the subject of this suit. Petitioner, City of Dearborn, determined that it would totally clear two residential neighborhoods (South End and Eugene-Porath). It would then rezone and industrialize these areas. However, having defined the

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[1] Jurisdiction under 28 U.S.C. Sec. 1343(3) was dismissed as to the Petitioner by the District Court. The Court of Appeals in its most recent decision declined to decide whether, as urged in the cross-appeal, it should be reinstated in light of changes in the law subsequent to the dismissal.

areas to be cleared, the City rather than next instituting condemnation, developed a program of arbitrary conduct that had the effect of forcing residents to sell. The City destroyed the private housing market with the result that sales would be only to the City. The City then paid less than adequate compensation for the homes it forced people to sell.

The District Court enumerated a substantial number of practices followed by the City that in combination had the effect of forcing residents to sell. Among these were the abuse by the City of its power to issue repair and occupancy permits and arbitrary requirements under the building code which seriously hurt the ability of residents to maintain and use their property. The District Court found that these requirements had the effect of forcing many residents to sell because they could not meet "the code". Certain homes were arbitrarily "tagged" as being ineligible for occupancy. Signs were erected inviting residents to vandalize homes acquired by the City and left open to trespass. In all, the District Court identified twenty-four practices that in combination forced sales.

The District Court went on to find that the valuation system employed by the City had the inevitable effect of providing less than adequate compensation to those who were forced to sell to the City. The Court then permanently enjoined the City from continuing the practices that forced residents to sell and required that condemnation be utilized if the City wished to proceed with the clearance. For those who sold to the City the District Court established a hearing procedure to ascertain the amount that each was underpaid.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THERE HAS BEEN AN UNCONSTITUTIONAL TAKING OF PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION WHERE THE PRACTICES OF A CITY IN THE CONDUCT OF AN URBAN RENEWAL PROGRAM HAVE THE COMBINED EFFECT OF FORCING OWNERS TO SELL

Petitioner City of Dearborn rests its argument on the fact that condemnation was not utilized in the urban renewal program that is the subject of this litigation. This leads Petitioner to focus on each house in the urban renewal area and ignore the City's clear intent to acquire all of the property involved.

It is uncontested that Petitioner engaged in a number of practices that in combination forced residents to sell to the City. Petitioner ignores this. Instead, Petitioner notes that it paid less than fair compensation for homes it acquired and, therefore, characterized the issue of the case as whether devaluation of property constitutes a constitutional "taking" in violation of the Fifth and Fourteenth Amendments. An examination of the nature of the City's clearance program establishes that the Opinion of the Court of Appeals for the Sixth Circuit is consistent with legal principles espoused by the Supreme Court and decisions of other Courts of Appeals.

A. The Circuit Court Opinion Is Consistent With Supreme Court Decisions

For a government to "take" property obviously does not require formal condemnation. *U.S.* v. *Clark*, 445 U.S. 253 (1980); *Kaiser Aetna* v. *U.S.*, 444 U.S. 164 (1979). Petitioner does not challenge this. Petitioner does refuse to view its defined clearance area as one project.

The Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977) stated at 130, 131:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole — here, the city tax block designated as the "landmark site."

In the instant case the Court of Appeals noted:

> . . . it is undisputed in the present case that the City included the entire Eugene-Porath area and a large portion of the South-End area in its clearance and redevelopment project plans. Plaintiffs either live in houses which have been designated for appropriation or have already sold their property to the City. (Petitioner's Appendix, A-14)

Petitioner sees a distinction between designating an entire area and every home therein for clearance and designating each home separately within a given area for clearance. It is for this reason that Petitioner attaches a different significance to condemnation than it does to forced sales. The rejected efforts of the appellants in *Penn Central, supra*, to focus exclusively on the airspace above the Grand Central Terminal had more merit.

Just as Petitioner views the area it affected too narrowly, it fails to focus on the property rights it destroyed. Petitioner apparently concedes that, as to all

of the members of the Respondent class who sold to the City, there exists a constitutional "taking". As to those who remain, however, Petitioner is looking for an actual appropriation of title or a physical invasion. The Supreme Court in *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945) defined the term "property", noting that it is not used in the

> vulger [*sic*] and untechnical sense of the physical thing with respect to which the citizen exercizes [*sic*] rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . The constitutional provision is addressed to every set of interest the citizen may possess. Id., at 377-378.

Fundamental to this "right to possess, use and dispose of property" is the right not to be forced to sell. The District Court found:

> 13. In order to acquire property in the subject areas, the City through its agents including the defendants, has encouraged people to sell their property to the City. This Court finds as a matter of fact that the following activities forced people to sell to the City. (Petitioner's Appendix, A-46)

The District Court proceeded to enumerate a substantial number of City practices that forced the sale of property (Petitioner's Appendix, A-46 through A-50).

The character of these practices should be noted. *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) at 84. The practices were not equivalent to incidental effects of a generally applicable regulation. See, e.g., *Pruneyard Shopping Center, supra; Euclid* v. *Amber Realty Co.*, 272 U.S. 365 (1926). Instead, the practices were purposeful

and designed to accomplish the desired result of making people sell to the City. The City then used these same practices to force people to accept less than adequate compensation.

Under the circumstances of this case Petitioner has not shown any conflict with the principles established by the Supreme Court to establish the perimeters of an unconstitutional "taking".

B. There Is No Conflict With Other Circuits

As previously noted, Petitioner appears convinced that the designation of an area for total clearance is somehow different than listing the actual addresses of the properties in the area to be acquired. This is a meaningless distinction. However, based on this distinction Petitioner asserts that the instant case is in conflict with *Florida East Coast Properties, Inc.* v. *Metropolitan Dade County*, 572 F2d 1108 (5th Cir. 1978); *Barbian* v. *Panagis*, 694 F2d 476 (7th Cir. 1982); and *Ortega Cabrera* v. *Municipality of Bayamon*, 562 F2d 91 (1st Cir. 1977). Each of these cases was concerned with the development of what to the plaintiffs was an undesirable use adjacent to their property. In *Florida East Coast Properties* it was a jail and work release facility, in *Barbian* it was the use of an access road by construction vehicles, and in *Cabrera* it was a municipal dump. The instant case does not involve activity adjacent to the defined boundaries of the clearance areas but within the clearance area. It is for this very reason that the Court of Appeals in the present matter distinguished its earlier decision in *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F2d 955 (6th Cir. 1970) which involved the negative effect of urban renewal on property adjacent to an urban renewal area. As the Court of Appeals noted,

this distinction was recognized in *Richmond Elks Hall Assoc.* v. *Richmond Redevelopment Agency*, 561 F2d 1327 (9th Cir. 1977) and *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F2d 784 (8th Cir. 1979) cert. denied, 444 U.S. 899 (1979). There is no conflict between the circuits on the issue presented. The cases used by Petitioner to suggest such a conflict do not apply to the present case.

C. There Is No Intra-Circuit Conflict

Petitioner urges that an intra-circuit conflict exists between the instant case and earlier decisions of the Sixth Circuit Court of Appeals. This is not a proper basis upon which to seek Supreme Court review. Such a concern more properly should have been addressed in a motion to the Court of Appeals for *en banc* reconsideration. Moreover, as noted in the reference to *Woodland Market, supra*, there is not an intra-circuit conflict.

D. The Issue Is Not Of Such General Importance As To Be Appropriate For Review

The present matter involves what in all respects is a standard urban renewal case with one significant difference. Clearance programs are typically conducted through the institution of condemnation proceedings. Petitioner instead purposely employed a number of arbitrary practices that in combination forced the residents of the clearance area to sell to the City and then used this same pressure to extract from the residents an agreement to accept less than adequate compensation for their property. As far as Respondent can ascertain this method of clearance is unique. Hopefully it will remain so. Petitioner's suggestion that municipalities will no longer feel comfortable with the conduct of their

clearance programs because of the Court of Appeals' decision in the instant case is without merit. Accepted methods of conducting a clearance program have little to do with Petitioner's conduct in the instant case. Respondent assumes that few if any municipalities will feel threatened by a decision that indicates that clearance through forced sales, resulting in arbitrary conduct, will be viewed as a "taking" in violation of the Fifth and Fourteenth Amendments.

CONCLUSION

Based on the aforesaid, Respondent, Katherine Amen, et al., respectfully requests that Petitioner City of Dearborn's request that a writ of certiorari be issued to review the Opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed on October 6, 1983, be denied.

Respectfully submitted,

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